

***United States Court of Appeals
for the Second Circuit***

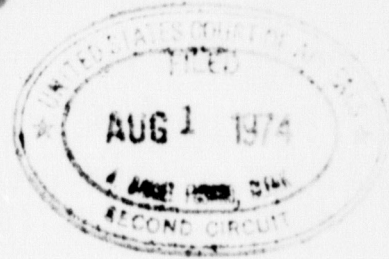


STATEMENT

74-1533

Bpls

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



IN THE MATTER)
OF)
SAPPHIRE STEAMSHIP LINES, INC.,)
Bankrupt.)

No. 74-1533

BRIEF OF SPECIAL COUNSEL
TO THE TRUSTEE

I.

PRELIMINARY STATEMENT

The Trustee in Bankruptcy has herein appealed Judge Milton Pollack's decision of March 15, 1974 which remands the question of allowances to be paid by the Estate to the Referee for further proceedings. Special counsel to the Trustee is adversely affected by Judge Pollack's decision in that said decision does not provide for payment of attorneys' fees to special counsel until such time as all petitions for allowances of compensation are ultimately resolved. This brief is not addressed to the propriety of other petitions for compensation, but solely to the issue of payment of attorneys' fees to special counsel.

II.

THIS COURT SHOULD APPROVE THE REFEREE'S
ALLOWANCE OF FEES TO SPECIAL COUNSEL

Referee Herzog's Certificate on Allowances dated February 8, 1974 approved an award of \$369,626.54 in fees and \$28,070.12 in disbursements to Joseph L. Alioto, Esq., retained herein as special counsel to the Trustee. The Referee's Certificate properly recognizes the services performed by special counsel and correctly details the settlement negotiations which lead to the ultimate settlement fund of \$2,473,070.12.

In approving an award of attorneys' fee in the amount of \$369,626.00, the Referee found that such award represents approximately 15% of the amount recovered, or well within the Court's guideline of approximately 20% of a large recovery. (Certificate of Allowances, p. 8). The Referee also noted that no opposition to special counsel's request for compensation had been voiced by creditors.

The Referee's Certificate on Allowances was disapproved by Judge Pollack in his decision of March 15, 1974 and the issue of allowances was remanded to the Referee for further proceedings. In so doing, however, Judge Pollack does not question the reasonableness of the award of fees and disbursements to special counsel. Judge Pollack's opinion of March 15, 1974 objects to the Certificate on Allowance in that Referee Herzog disallowed compensation to the attorneys

for certain creditors and to general counsel to the Trustee. The issue on appeal is thus whether the Referee can properly award interim compensation to general counsel to the Trustee and also compensation to attorneys representing creditors for their alleged contributions to the creation of the settlement fund. The recommended award of attorneys' fees to special counsel has not been contested or appealed and thus should be approved by this Court.

In reference to the recommended award of compensation to special counsel to the Trustee, Judge Pollack states at page 19 of his opinion: " . . . it is preferable that all those equitably entitled to be compensated should be considered at the same time to avoid any individual or overall distortions." While this reasoning may be applicable to a situation where objections have been raised to all applications for compensation, it should not be controlling in this instance where no objection has been raised to the proposed award of fees to special counsel to the Trustee. There is nothing on the record which should preclude this Court from approving the award of fees and disbursements to special counsel to the Trustee as recommended by Referee Herzog in the Certificate on Allowances.

III.

THE COURT SHOULD ORDER IMMEDIATE
PAYMENT OF FEES TO SPECIAL COUNSEL

As is clearly reflected on the record, special counsel

to the Trustee has been actively engaged in prosecuting the antitrust claim of the bankrupt for almost seven years. In so doing, special counsel has expended in excess of 6,231 hours and has disbursed in excess of \$28,070.12 on behalf of the bankrupt. As a direct result of the efforts of special counsel, the Estate has been enhanced by \$2,473.070.12 in settlement of its antitrust claims. Final approval of the compromise was given by the Referee more than seven months ago, on October 30, 1973.

In spite of the foregoing, to date special counsel has not received any compensation whatsoever for his services. It is unconscionable to require him to wait any longer. The effect of Judge Pollack's opinion of March 15, 1974 is to remand the question of all allowances to the Referee for further proceedings. These proceedings will require an additional hearing upon proper notice, the preparation of a Certificate on Allowances, and an additional hearing and order by the District Court. It is, of course, possible that this order would also be appealed. As a result, special counsel would not receive payment of attorneys' fees and disbursements for, at least, an additional year.

As there have been no objections to the award of fees to special counsel, there is no conceivable reason to withhold payment for this additional period of time. If it should ultimately be determined that general counsel to the

Trustee and the attorneys for certain creditors are to be compensated for their efforts in the creation of the settlement fund, there are ample assets in the Estate to provide said compensation. Any possible award to either the general counsel to the Trustee or the creditors' attorneys certainly will not affect the total of the hours spent or the costs advanced by special counsel. The award of fees and disbursements to special counsel has been approved, without objection, and should be paid.

IV.

CONCLUSION

For the reasons stated above, special counsel to the Trustee respectfully requests this Court to approve the Referee's allowance of fees and disbursements to special counsel, and direct the Referee to authorize immediate payment of said fees and disbursements.

Dated: July 20, 1974.

RESPECTFULLY SUBMITTED:

LAW OFFICES OF JOSEPH L. ALIOTO

By

Joseph L. Alioto
Joseph L. Alioto

ROBERT E. SHER
ROBERT A. RANDICK, JR.

Of Counsel

CERTIFICATE OF MAILING

The undersigned certifies he is an active member of the State Bar of California, not a party to the within action, and his business address is:

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He served a true copy of the foregoing document by mail by placing same in an envelope, sealing, fully prepaying postage thereon, and depositing said envelope in the U.S. mail at San Francisco, California, on the 21st day of July, 1974, said envelope being addressed as follows:

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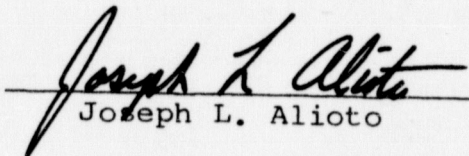
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